No. 17-1717, No. 18-18

In The

Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

and

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF 84 UNITED STATES SENATORS AND MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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December 26, 2018

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INTEREST OF AMICI CURIAE[1]

Amici curiae are a group of 84 United States Senators and Members of the United States House of Representatives. They are listed alphabetically in the first appendix to this brief. As elected representatives of "a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), amici wish to preserve the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life . . . ." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Amici are concerned that the interpretation of the Establishment Clause reflected in the decision below would threaten federal displays and traditions that incorporate religious words and images, including several in the United States Capitol, and thereby disrespect the shared history and values those displays commemorate. Monuments and symbols that memorialize the sacrifice of the men and women of the United States Armed Forces enjoy a special place in our nation's history, and amici have an especially strong interest in protecting them.

SUMMARY OF THE ARGUMENT

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S.

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that all parties have given written consent to the filing of this brief. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

CONST. amend. I. It "does not say that in every and all respects there shall be a separation of Church and State." *Zorach*, 343 U.S. at 312. To the contrary, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. To "disabl[e]" the government from the use of religious symbolism to acknowledge important aspects of our history is to "evince a hostility to religion" that is inconsistent with the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677, 683–84 (2005) (plurality opinion); *see also id.* at 699 (Breyer, J., concurring in the judgment); *id.* at 711 (Stevens, J., dissenting).

Despite this clear principle, which has provided a fixed point of agreement in an otherwise fractured jurisprudence, a divided panel of the United States Court of Appeals for the Fourth Circuit adopted what amounts to a per se rule that the display of crosses on government property violates the Establishment Clause. This rule of decision disregards the "historical practices and understandings" of crosses as symbols of courage, sacrifice, and remembrance, *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014), and will require the destruction, disfigurement, or removal of a cherished memorial of those who gave their lives for this country. It also calls into question the constitutionality of countless federal monuments, historic places, and national traditions that use a cross or other "inherently religious" symbols or language to commemorate our nation's history and to reflect values shared by the American people.

ARGUMENT

I. The Decision Below Would Jeopardize Countless Federal Monuments, Historic Places, and National Traditions.

The cross at the center of this case is part of a memorial honoring the young men from Prince George's County who perished fighting for their country in WWI ("the Bladensburg Memorial"). It is emblazoned with the words "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION," and inscribed with a description of the cause to which the fallen gave their last full measure of devotion. Pet. App. 42a. It stands among other tributes—large and small—to the sacrifices of other brave men and women in other conflicts. Pet. 7–8. And it has stood, unchallenged, throughout its nearly century-long life. Pet. 8.

The Bladensburg Memorial is not the only cross at stake, however. The Federal Government frequently uses crosses as symbols of courage, sacrifice, and remembrance, or otherwise permits commemorative crosses to stand on federal land. The decision below jeopardizes these and a wealth of other religious symbols and language incorporated into our national monuments and traditions.

In illuminating the requirements of the Establishment Clause, a "page of history" is worth a "volume of logic." *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 681 (1970). The examples discussed below confirm that the public display of religious symbols can "coexist with the principles of disestablishment and religious freedom." *Town of*

Greece, 572 U.S. at 578 (alteration omitted). Any decision that would require their destruction cannot be reconciled with the Establishment Clause.

1. *WWI Crosses*

Perhaps most relevant are two crosses that stand in Arlington National Cemetery in Virginia. Like their neighbor to the north, these crosses honor Americans who died in WWI. The first is the Argonne Cross, a 13-foot-tall Latin cross of white marble. *Argonne Cross*, ARLINGTON NATIONAL CEMETERY, https://goo.gl/Cnb3W9.[2] The memorial was approved by the National Commission of Fine Arts and erected by the Argonne unit of the American Women's Legion. THE NATIONAL COMMISSION OF FINE ARTS, NINTH REPORT 70 (1921); THE NATIONAL COMMISSION OF FINE ARTS, TENTH REPORT 69 (1926). It was dedicated on November 13, 1923, "[i]n memory of our men in France." *Id.* Nearly a century later, the Argonne Cross stands as "a silent reminder of the largest, bloodiest, and most important battle fought by American troops during the war—and the final push that helped compel Germany to surrender." Philip Kennicott, *Memorials to World War I may be less obvious, but more meaningful*, WASH. POST (Aug. 8, 2014), https://goo.gl/goyEZI.[3] "Nearby, grave markers are inscribed with dates from October and November 1918, when more than a million American troops engaged in the Argonne offensive." *Id.* The pine grove that stands around the memorial is "symbolic of the

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[2] Appendix B contains pictures of the Argonne Cross and many (but not all) of the other monuments, medals, and works of art discussed in this brief.

[3] All websites accessed December 21, 2018.

Argonne Forest where many of the men fought" and died. *Argonne Cross*, *supra*.

The second is the Canadian Cross of Sacrifice, a 24-foot-tall granite cross. *Canadian Cross of Sacrifice*, ARLINGTON NATIONAL CEMETERY, http://goo.gl/R0wVIJ. The Canadian government donated this memorial in 1927 to honor Americans who sacrificed their lives while serving in Canadian forces during WWI, many before the United States entered the war. *Id.* The memorial is in the form of a "sword of sacrifice," which consists of an "adapted Celtic cross," with "a chivalric metal sword at its core." App.948. "Sword[s] of sacrifice" have been erected around the world in honor of those who died in WWI. App.950–51. Over the years, the Canadian Cross has been inscribed with additional dedications to honor those who served in World War II and the Korean War. *Canadian Cross of Sacrifice*, *supra*.

As with the Bladensburg Memorial, the crosses used for these two memorials have special significance derived from the historical context in which they were erected. Courts have routinely recognized that a Latin cross is "a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (Kennedy, J.). The crosses that emerged after WWI, however, were imbued with added significance.

The Cross of Sacrifice, for example, was seen as a chivalric "throwback" to individual combat that, after an industrialized, mechanized war, "attached to every single soldier lost in the war the notion that he gave his life for a noble cause." App.950–51. Although

its meaning is multifaceted, at bottom, "[t]his cross turned into a sword is not a call to religious belief but a symbol of the void created by the Great War." App.954.

And even today, the "plain unadorned white" Argonne Cross still "no doubt evoke[s] the unforgettable image of the white crosses, row on row, that mark[ ] the final resting places of so many American soldiers who fell in" World War I and were buried overseas—as it did when it was erected "for those with searing memories of The Great War." *Buono*, 559 U.S. at 725 (Alito, J.); *see also* App.938 & n.13. Indeed, for bereaved families with no gravesite to visit, or for those without means to travel to a distant overseas grave, memorial crosses served—and continue to serve—as symbolic gravesites and places of homecoming. App.936–37. As the American Legion explained in a resolution adopted in the early 1920s,

> [C]rosses represent the symbol of America's sacrifice in the World War, and have been the inspiration of our great war poems, and were first improvised and erected by our comrades in the field and are fixed in the minds of the gold star fathers and mothers and the Nation as an impressive emblem of sacrifice for country and humanity.

App.1180.

When it came time for the United States Government to erect permanent markers on the graves of American Soldiers, Sailors, Airmen, and Marines buried in Europe, Congress took special note of the symbolic meaning that the Latin crosses had for

the families and comrades-in-arms of the dead. When the servicemen were first buried, their graves had been marked, first with improvised crosses, and then with uniform wooden crosses and Stars of David. App.1166 (H.R. Res. 15, 68th Cong. at 2 (1924)). Congressman Piatt Andrew noted that "[t]hose markers were distinctively symbols of the World War. They were different from civilian grave markers, and they became particularly identified in the thoughts of everybody with those who had made the great sacrifice in the World War." *Id.*; *see also* App.1179 (Statement of Mr. John Thomas Taylor, Vice Chairman, American Legion, Legislative Committee) (describing the symbolism of a cross for his fellow infantrymen); App.1181–82 (Statement of Mr. Lloyd M. Brett, Commander in Chief, VFW) (same); App.1210 (Letter from Mrs. George Gordon Seibold to Hon. A. Piatt Andrew (Mar. 12, 1924)) (noting that servicemen were issued "two pieces of wood to form a cross for a fallen hero"). One mother who had the opportunity to visit her son's overseas grave captured the feeling well when she explained that,

> at sunset, and just as the rays of the sun fell on the beautiful American flag and those glistening crosses[,] it brought home to her the fact that her son was lying ever on duty in France, that there was something wonderful and brave back of that sacrifice, that his spirit and self-sacrifice would live.

App.1193 (Statement of Mrs. Franklin Lee Bishop, National President, American Legion Auxiliary).

Congressional records of the debate surrounding the choice of permanent markers reveal that the push to maintain crosses was animated primarily by a desire to honor this association. App.1166–67 (noting that the purpose of permitting families to mark graves in a manner consistent with their religious beliefs could be accomplished as easily by uniform headstones marked with small symbols of faith, as in Arlington); App.1215–16 (Letter of Bishop James E. Freeman to Mrs. James Carroll Frazer (Mar. 12, 1924)) ("Practically all around the world the cross is regarded as the supreme symbol of sacrifice. This, independent of any religious belief, would justify its use."). Reflecting these sentiments, the American Battle Monuments Commission voted unanimously to retain the markers. App.1203–04.

For similar reasons, Congress has sought to protect memorial crosses around the Nation that were erected in remembrance of WWI and other conflicts. For example, in response to an injunction ordering the removal of a memorial cross in Mojave National Preserve—the memorial cross at issue in *Salazar v. Buono*—Congress enacted legislation transferring the federal land on which the memorial was located to private owners in order to maintain the cross "as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121, 117 Stat. 1100 (2004). In another case, Congress enacted legislation designating the Mt. Soledad Veterans Memorial in San Diego as "a national memorial honoring veterans of the United States Armed Forces" and requiring the Federal Government to exercise its power of eminent domain

to acquire the Mt. Soledad memorial in order to preserve it for this purpose. Consolidated Appropriations Act, Pub. L. No. 108-447, § 116(a), 118 Stat. 3346 (2005); Preservation of Mt. Soledad Veterans Memorial, Pub. L. No. 109-272, 120 Stat. 770 (2006). Although not admitting the validity of the challenges to these memorials under the Establishment Clause, Congress acted out of a desire both to preserve historically significant monuments and to honor the sacrifice of U.S. service members. *See generally* 152 CONG. REC. H5244-02 (2006), 2006 WL 2009154. In doing so, members of Congress recognized that the crosses at issue were "not only . . . religious symbol[s]," but also "venerated landmark[s]." *Id.*

2. *Other Crosses*

The Federal Government uses or supports the use of crosses as symbols of courage, sacrifice, and remembrance in a variety of other contexts.

Crosses are common motifs in monuments honoring those who fought to preserve the Union during the Civil War. A nearly twenty-foot tall Celtic cross honors the three New York regiments of the Irish Brigade at Gettysburg National Military Park. *Irish Brigade Monument at Gettysburg*, STONE SENTINELS, https://goo.gl/DtCFiF. It was sculpted by a former *Confederate* soldier who fought at Gettysburg and dedicated as a symbol of fidelity and reconciliation. *Id.* Smaller crosses adorn numerous other monuments throughout the park. *See, e.g.*, *'Second Buffalo'*, STONE SENTINELS, https://goo.gl/sRHH2D; *140th New York Volunteer Infantry Regiment*, STONE SENTINELS, https://goo.gl/u2hwmM. The City Point National

Cemetery in Hopewell, Virginia, contains the Army of the James Monument. *City Point National Cemetery*, NATIONAL CEMETERY ADMINISTRATION, http://goo.gl/28BKQw. That monument depicts a cross and is inscribed "Sacred to the Lamented Dead of the Army of the James." *Id.* The Winchester National Cemetery in Winchester, Virginia, contains several monuments that incorporate crosses as symbols of different Army Corps. *See Winchester National Cemetery*, NATIONAL CEMETERY ADMINISTRATION, http://goo.gl/TCvPwf; *3rd Massachusetts Volunteer Cavalry Regiment monument*, STONE SENTINELS, https://goo.gl/bu9tms; *12th Connecticut Volunteer Infantry Regiment monument*, STONE SENTINELS, https://goo.gl/GNzQvn; *13th Connecticut Volunteer Infantry Regiment monument*, STONE SENTINELS, https://goo.gl/ubTNu7; *6th Corps*, STONE SENTINELS, https://goo.gl/FfdhVL.

On Chaplains Hill in Arlington National Cemetery, four monuments employing religious symbols, including crosses, are dedicated to the memory of chaplains who have served in the United States Armed Forces. *Chaplains Hill and Monuments*, ARLINGTON NATIONAL CEMETERY, http://goo.gl/GwF7B4. They are inscribed with religious language, including the following passage from the Bible, *John* 15:13: "Greater Love Hath No Man Than This, That A Man Lay Down His Life For His Friends." *Id.* The Spanish-American War Nurses Monument in Arlington National Cemetery incorporates a Maltese Cross. *Spanish-American War Nurses Monument*, ARLINGTON NATIONAL CEMETERY, http://goo.gl/xQruDR. Dedicated "To Our Comrades," it rests among the graves of nurses who lost their lives during that war. *Id.*

Crosses commemorate sacrifice and loss off the battlefield, as well. The Cross at Ground Zero—intersecting steel beams resembling a Latin cross that were recovered from the wreckage of the World Trade Center in the wake of the September 11 attacks—sits in the National September 11 Memorial & Museum in New York, New York. Sally Jenkins, *9/11 memorials: The story of the cross at Ground Zero*, WASH. POST (Sept. 8, 2011), https://goo.gl/EZoVnk. The cross provided a "symbol of hope and healing" for people of many faiths in the wake of the attacks and served as a gathering place for services held at Ground Zero. *American Atheists, Inc. v. Port Auth. of New York & New Jersey*, 760 F.3d 227, 234 (2d Cir. 2014). The former Commissioner of New York City's Office of Emergency Management said of the cross:

> It didn't matter what religion you were, what faith you believed in . . . It was life, it was survival, it was the future . . . I would say that it represents the human spirit. That it represents good over evil. That it represents how people will care for each other at the worst moment in their life. How people can put aside their differences for the greater good.

Id. at 237.

A national memorial honoring fallen firefighters, located on federal property in Emmitsburg, Maryland, is topped by a Maltese Cross, the traditional symbol of the fire service. *See* Federal Fallen Firefighters' Memorial, Pub. L. No. 101-347, 104 Stat. 398 (1990); *National Fallen Firefighters Memorial*, NATIONAL FALLEN FIREFIGHTERS FOUNDATION, http://goo.gl/1HbqAW. The Cape Henry Memorial Cross, a Latin cross, stands in the Colonial

National Historical Park in Virginia as a tribute to the English colonists who landed there in 1607 and erected a wooden cross "in prayer for a safe arrival to this new land." *Cape Henry Memorial Cross*, NATIONAL PARK SERVICE, https://goo.gl/pBrYnJ.

The federal government's use of a cross is not limited to monuments. As a symbol of valor and sacrifice, it also figures in many military traditions. Numerous medals of valor take the form of a cross, a chivalric tradition dating to the middle ages that was adopted in this country in the wake of WWI. *See* 10 U.S.C. § 3742 (Distinguished Service Cross); *id.* § 6242 (Navy Cross); *id.* § 6245 (Distinguished Flying Cross); *id.* § 8742 (Air Force Cross); *Coast Guard Cross*, THE INSTITUTE OF HERALDRY, DEPARTMENT OF THE ARMY (on file with counsel) (Coast Guard Cross; explaining that "[t]he Cross stands for personal sacrifice"); App.147–48 (noting that cross-shaped medals were adopted after WWI). A national memorial erected to honor the recipients of the Distinguished Flying Cross is, naturally, a cross. *See* Distinguished Flying Cross National Memorial Act, Pub. L. No. 113-132, 128 Stat. 1727 (2014).

Sometimes as a reference to these medals, and sometimes for other reasons, military units and naval ships adopt crests or insignia that incorporate crosses. Many ships, for example, incorporate crosses into their crests to symbolize a medal for valor awarded to their namesake. *See, e.g.*, *USS Arleigh Burke*, THE INSTITUTE OF HERALDRY, DEPARTMENT OF THE ARMY (on file with counsel); *USS Mason Command Crest*, U.S. NAVY, http://goo.gl/3Rar29. Similarly, the crest of the USS Pearl Harbor includes a gold cross on a dark blue field to "commemorate the fifty-two Navy cross

awardees, the largest number of awards for any single engagement in U.S. history." *USS Pearl Harbor*, THE INSTITUTE OF HERALDRY, DEPARTMENT OF THE ARMY (on file with counsel).

Alternatively, a cross might refer to an engagement in which the unit or a predecessor ship served. For example, the Third Cavalry Regiment's Coat of Arms incorporates a white cross on a green background as a reference to the unit's first engagement, the Battle of Veracruz during the Mexican-American War. *3d Cavalry Regiment*, THE INSTITUTE OF HERALDRY, DEPARTMENT OF THE ARMY (on file with counsel). The Fifth Cavalry Regiment's insignia incorporates a cross moline, which represents the iron pieces of a mill stone, to commemorate its charge at Gaines Mills during the Civil War. *5th Cavalry Regiment*, THE INSTITUTE OF HERALDRY, DEPARTMENT OF THE ARMY (on file with counsel). The USS Cape St. George, named for "the classic sea battle at Cape St. George in the World War II Pacific Theater," incorporates the cross of St. George into its seal. *USS Cape St. George*, THE INSTITUTE OF HERALDRY, DEPARTMENT OF THE ARMY (on file with counsel).

Sometimes, these crosses have an explicitly religious derivation. The crest of the USS Rentz incorporated a cross in memory of its namesake, Chaplain George Rentz. Commander Rentz sacrificed his life during WWII when a Japanese attack on the USS Houston caused it to sink:

> Rentz . . . reached safety on . . . the spare main float [of an airplane]. [Finding it] dangerously overloaded and seeing wounded survivors, some without life

> jackets struggling to remain afloat, he determined to relinquish both his life jacket and his place on the float . . . Finding no one who would let him carry out his wish, however, Chaplain Rentz remained with his Shipmates . . . , encouraging them with hymns and prayers . . . Ultimately, he succeeded in placing his life jacket by a wounded sailor . . . before slipping away into the sea . . . ."

USS Rentz, Honoring 30 Years of Naval Service and the History Behind Its Namesake, THE OFFICIAL BLOG OF THE U.S. NAVY CHAPLAIN CORPS (on file with counsel). The motto of the ship, "Dread Nought," "tells all to have no fear for the ship is watched over by higher powers." *Id.* Although the USS Rentz has since been decommissioned, its traditions are a testament to the importance of preserving the use of religious symbols that have taken on historical significance, even if they derive from an "inherently religious" reference.

In the civilian context, a red Greek Cross is a ubiquitous sign of medical aid and has long been designated as such under international law. *See* Geneva Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field, art. 7, Aug. 22, 1864 (designating the red cross as the "distinctive and uniform" insignia for "hospitals, ambulances and evacuation parties" on the battlefield). The American National Red Cross is a "Federally chartered instrumentality of the United States," 36 U.S.C. § 300101(a), that provides disaster relief, support for military families, public health

services, and humanitarian aid. *Disaster Relief*, AMERICAN RED CROSS, http://goo.gl/f1lt5r. As Respondents' expert acknowledged, its symbol has religious origins. *See* App. 83–84. Yet the American Red Cross continues to employ it, even though it considers the appearance of impartiality and neutrality between religions to be critical to its mission of "prevent[ing] and alleviat[ing] human suffering in the face of emergencies," *Mission & Values*, AMERICAN RED CROSS, http://goo.gl/qVW5FY.

3. *Other Religious Symbols and Traditions*

The federal government also uses "inherently religious" symbols or words apart from a cross, all of which would be jeopardized by the absolutist, ahistorical vision of the Establishment Clause reflected in the decision below.

In addition to the memorials already mentioned, Arlington National Cemetery includes others with religious language. In the Tomb of the Unknown Soldier, there "RESTS IN HONORED GLORY AN AMERICAN SOLDIER KNOWN BUT TO GOD." *The Tomb of the Unknown Soldier*, ARLINGTON NATIONAL CEMETERY, http://goo.gl/iX2BAZ. The poem High Flight is inscribed on the Space Shuttle Challenger Memorial. This poem, from which President Ronald Reagan quoted in his seminal address following the explosion of the Space Shuttle Challenger, ends with the following lines: "[A]nd while with silent, lifting mind I've trod/ the high untrespassed sanctity of space/ put out my hand, and touched the face of God." *Space Shuttle Challenger Memorial*, ARLINGTON NATIONAL CEMETERY, http://goo.gl/0lpn1j. A bronze plaque "To

The Glory Of God And In Grateful Remembrance Of The Men And Women Of The Armed Forces Who In This Century Gave Their Lives For Our Country That Freedom Might Live" was added to the Spanish-American War Monument in 1964. *Spanish-American War Monument*, ARLINGTON NATIONAL CEMETERY, http://goo.gl/9zp5dn.

Just a few miles from Arlington, the steps of the U.S. Navy Memorial in Washington, D.C., are engraved with the words of the "Navy Hymn," which beseeches the "Eternal Father" to "hear us when we cry to Thee/ For those in peril on the sea!" That hymn was played by the U.S. Navy Band as President John F. Kennedy's body was carried up the steps of the U.S. Capitol to lie in state and continues to be sung at the U.S. Naval Academy in Annapolis, Maryland. *Eternal Father—The "Navy Hymn,"* U.S. NAVY, http://goo.gl/t9zSm6.[4] Also in Washington, D.C., the National Law Enforcement Officers Memorial incorporates "inspiring quotes capturing the spirit of the heroic men and women who are [there] honored," including the following passage from the Bible, *Proverbs* 28:1: "The wicked flee when no man pursueth: but the righteous are as bold as a lion." *Carved on These Walls*, NATIONAL LAW ENFORCEMENT OFFICERS MEMORIAL FUND, http://goo.gl/3B5Tr. And of course, the Lincoln Memorial is carved with the

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[4] Religious songs are commonly performed by the military in state funerals. One popular hymn is the "Battle Hymn of the Republic," which includes such overtly religious language as: "In the beauty of the lilies Christ was born across the sea,/ With a glory in His bosom that transfigures you and me;/ As He died to make men holy, let us die to make men free,/ While God is marching on." *See, e.g., Ronald Reagan Funeral Service*, C-SPAN, http://goo.gl/tluEDW.

immortal words of President Lincoln's Second Inaugural Address, in which he "pray[s]" "fervently . . . that this mighty scourge of war may speedily pass away," but calls on the Nation to accept the Lord's judgment as "true and righteous altogether." *Lincoln's Second Inaugural*, NATIONAL PARK SERVICE, https://goo.gl/hhmJc1.

President Lincoln's words also adorn the Eternal Light Peace Memorial at Gettysburg, which was dedicated by President Franklin D. Roosevelt on the 75th anniversary of the battle: "With firmness in the right as God gives us to see the right." *Eternal Light Peace Memorial*, STONE SENTINELS, https://goo.gl/AdwVPy. Close by, a statue depicting Reverend Father William Corby, C.S.C., eternally gives final absolution to the men of the Irish Brigade who fell in the Wheatfield. *Father William Corby*, STONE SENTINELS, https://goo.gl/goGSdM. A nearby monument to the 1st Massachusetts Sharp Shooters nods to Oliver Cromwell: "In God we put our trust but kept our powder dry." *1st Massachusetts Sharp Shooters*, STONE SENTINELS, https://goo.gl/ANaHxX.

Congress has also preserved sacred sites at the public expense. *See, e.g.*, Press Release, The White House, Presidential Proclamation—Establishment of the Bears Ears National Monument (Dec. 28, 2016), https://goo.gl/thThmN (emphasizing that "most notably the land is profoundly sacred to many Native American tribes . . ." and requiring the relevant secretaries to "ensure the protection of Indian sacred sites and traditional cultural properties in the monument and provide access by members of Indian tribes for traditional cultural and customary uses"); An Act To Establish the Channel Islands National

Park, and for Other Purposes, Pub. L. No. 96-199, § 106, 94 Stat. 67 (1980) (authorizing the Secretary of the Interior "to make suitable arrangements for . . . the [Palmer Chapel] to continue to be used for memorial purposes by former residents and their descendants"). Indeed, there is a special prayer room in the U.S. Capitol itself. This room contains a Bible and overtly sectarian imagery and language, including a depiction of "President Washington kneeling in prayer; around him is etched the first verse of the 16th Psalm: 'Preserve me, O God, for in Thee do I put my trust.'" *Allegheny Cty. v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in part and dissenting in part).

Outside of these sacred rooms, Federal buildings are decorated with religious symbols. The CIA Old Headquarters Building, in Langley, Virginia, features words from *John* 8:32: "And ye shall know the truth and the truth shall make you free." *Bible Quote Carving*, CENTRAL INTELLIGENCE AGENCY, https://goo.gl/D6WtUn. These words were added at the insistence of former Director Allen Dulles, who was the son of a Presbyterian minister, and have since become the Agency's motto. *Id.* The words "In God We Trust" appear in or at the entrance to both chambers of Congress. *See Engel v. Vitale*, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring); *Allegheny*, 492 U.S. at 673 (Kennedy, J.). The courtroom of this Court famously depicts Moses, Mohammed, Confucius, and the Ten Commandments. *Id.* at 652–53 & n.13 (Stevens, J., concurring in part and dissenting in part). The walls of the Library of Congress are adorned with religious writings and artwork. *On These Walls*, LIBRARY OF CONGRESS,

https://goo.gl/z12VKc. The ceiling of the Members Reading Room, for example, incorporates a Bible to represent Universal Law in a panel depicting the "Light of Truth," while in the entrance to the Main Reading Room, the figure of Anarchy is shown trampling a Bible. *Id.* The ceiling of the Members Reading Room also centrally features God creating light, speaking the words from *Genesis*: "Let there be light." *Id.*[5] The Great Hall of the U.S. Department of Justice features a commissioned painting of Jesus Christ—a subject selected under the advice of Justice Harlan Fiske Stone and Dean Roscoe Pound. U.S. DEPARTMENT OF JUSTICE, THE ROBERT F. KENNEDY BUILDING 76, *available at* https://goo.gl/jZxe8R; *see also Lynch*, 465 U.S. at 676–77 (describing religious

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[5] Perhaps unsurprisingly, religious imagery and words are ubiquitous in the Library of Congress. In the Main Reading Room, bronze statues of St. Paul and Moses stand beneath a dome on which the commandment "Thou shalt love thy neighbor as thyself" is inscribed in Hebrew characters. And a figure representing Religion stands beneath a large tablet asking, in the words of *Micah*, "what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?" Another tablet invokes Alfred Lord Tennyson: "One God, one law, one element, and one far-off divine event, to which the whole creation moves." Yet another quotes *Psalms* 19:1: "The heavens declare the glory of God; and the firmament sheweth his handiwork." In the West Corridor, numerous tablets have religious content: "The light shineth in darkness, and the darkness comprehendeth not." *John* 1:5. "All are but parts of one stupendous whole, whose body Nature is, and God the soul." Alexander Pope, *Essay on Man*. So, too, in the North Corridor: "Wisdom is the principal thing; therefore get wisdom and with all thy getting, get understanding." *Proverbs* 4:7. "Ignorance is the curse of God. Knowledge the wing wherewith we fly to Heaven." William Shakespeare, *Henry IV*. The list goes on. *On These Walls*, LIBRARY OF CONGRESS, https://goo.gl/z12VKc.

artwork in national galleries as examples of permissible religious displays).

The Federal Government's recognition of religion extends beyond these physical displays. Our national motto, which appears on our currency, is "In God We Trust." 36 U.S.C. § 302; 31 U.S.C. § 5112.[6] Our national anthem proclaims that "In God is our Trust." 36 U.S.C. § 301(a). We pledge allegiance to "one Nation under God." 4 U.S.C. § 4. Presidents since George Washington, as well as countless other officials, have taken their oath of office on the Bible, *Lee v. Weisman*, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting), frequently adding the words "so help me God," *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting). Congress has recognized Christmas and Thanksgiving as federal holidays, 5 U.S.C. § 6103, and the President has repeatedly issued proclamations commemorating other religiously significant events, *see Lynch*, 465 U.S. at 677 & n.5. Each year, the Federal government erects Christmas displays around the Capital and in federal buildings across the nation.

Prayer has played a particularly significant role in our national traditions and in all three branches of government. *Lee*, 505 U.S. at 633–35 (Scalia, J., dissenting). The day after the First Amendment was proposed, the First Congress asked President Washington to proclaim "a day of public

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[6] Some state mottos also invoke a higher being. *See, e.g.*, ARIZ. CONST. art. 22 § 20 ("Ditat Deus"); CO. REV. STAT. ANN. § 24-80-901 ("Nil Sine Numine"); KY. REV. STAT. ANN. § 2.105 ("Deo gratiam habeamus"); OHIO REV. CODE ANN. § 5.06 ("With God, All Things Are Possible"); S.D. CONST. art. 21 § 1 ("Under God the People Rule").

thanksgiving and prayer." *Lynch*, 465 U.S. at 675 n.2. Today, codified statutes direct the President to proclaim a National Day of Prayer, 36 U.S.C. § 119, and request a Memorial Day proclamation "calling on the people of the United States to observe Memorial day by praying, according to their individual religious faith, for permanent peace," 36 U.S.C. § 116(b)(1). In support of the practice of legislative prayer, "[t]he First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." *Town of Greece*, 572 U.S. at 575. Federal courts likewise open sittings with a prayer that dates to Chief Justice Marshall's days, asking that "God Save the United States and this Honorable Court." *McCreary Cty.*, 545 U.S. at 886 (Scalia, J.).

Examples could be multiplied. "It can be truly said . . . that today, as in the beginning, our national life reflects a religious people." *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963). The decision below would jeopardize that life and finds no place in the Establishment Clause, which, as this Court has repeatedly made clear, does not displace but respects our religious heritage.

II. The Establishment Clause Does Not Prohibit the Use of Symbols with Religious Meaning To Commemorate Our Nation's History and To Reflect Values Shared By the American People.

This Court has consistently declined to interpret the Establishment Clause in a way that would sweep away the countless references to religion

"that run through our laws, our public rituals, [and] our ceremonies." *Zorach*, 343 U.S. at 313. It has acknowledged that the state "follows the best of our traditions" when it "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.* at 314. Accordingly, official acknowledgments of religion—including in the form of memorial crosses on public property—must be judged by their place in our nation's history and traditions. *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

Most recently, in *Town of Greece*, this Court reaffirmed that the practice of legislative prayer is permissible under the Establishment Clause. 572 U.S. at 591–92. In doing so, the Court relied on "our history and tradition," which demonstrate that legislative prayer can "coexist with the principles of disestablishment and religious freedom." *Id.* at 578 (alteration omitted). Significantly, even though the prayers at issue in that case had sectarian content, the Court concluded that their "religious themes provide[d] particular means to universal ends" and that they therefore could "still serve to solemnize the occasion." *Id.* at 583. The dissenters did not reject this premise; instead, they dissented on the fact-intensive grounds that the town had "failed to make reasonable efforts to include prayer givers of minority faiths." *Id.* at 615 (Breyer, J., dissenting); *see also id.* at 632 (Kagan, J., dissenting). In doing so, they were careful to acknowledge the value of overtly religious traditions. *See id.* at 610–11 (Breyer, J.); *id.* at 631–32 (Kagan, J.).

As the substantial agreement between the majority and dissent confirms, this Court has looked to the history and tradition of official

acknowledgments of religion and eschewed bright-line rules that require the state to purge religion from the public sphere. This practice applies equally to religious displays, as reflected in the Court's most recent decisions on that subject.

In a pair of decisions in 2005, this Court considered whether certain displays of the Ten Commandments on public property violated the Establishment Clause. *See Van Orden*, 545 U.S. 677; *McCreary Cty.*, 545 U.S. 844. The Court upheld one display and struck down another. Although fractured, the opinions in these cases uniformly acknowledged that the Establishment Clause does not prohibit prominent displays of religious symbols. *See Van Orden*, 545 U.S. at 690 (plurality opinion) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."); *id.* at 692 (Scalia, J., concurring) (joining the plurality because it "accurately reflects our current Establishment Clause jurisprudence"); *id.* (Thomas, J., concurring) (joining the plurality because it "properly recognizes the role of religion in this Nation's history and the permissibility of government displays acknowledging that history"); *id.* at 701 (Breyer, J.) (upholding the display because it "convey[s] not simply a religious message but also a secular moral message" and "historical message"); *id.* at 711 (Stevens, J., dissenting); *id.* at 737 (Souter, J., dissenting); *id.* (O'Connor, J., dissenting); *McCreary Cty.*, 545 U.S. at 867 (acknowledging that the Court's precedents "did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and [that] under the Establishment Clause detail is key"); *id.* at 883 (O'Connor, J.,

concurring) (basing her concurrence on "the history of this particular display of the Ten Commandments"); *id.* at 907 (Scalia, J., dissenting) ("Perhaps in recognition of the centrality of the Ten Commandments as a widely recognized symbol of religion in public life, the Court is at pains to dispel the impression that its decision will require governments across the country to sandblast the Ten Commandments from the public square.").

More recently, in *Salazar v. Buono*, the Court considered a challenge to a Latin cross that had been erected by World War I veterans on federal land and subsequently designated as a national memorial. 559 U.S. 700, 705–06 (2010). Although this Court's decision turned on the standards for injunctive relief, three members of the Court commented on the standard by which religious displays on public land are judged under the Establishment Clause. Justice Kennedy, joined by the Chief Justice and Justice Alito, criticized the district court for "concentrat[ing] solely on the religious aspects of the cross, divorced from its background and context." *Id.* at 702. He acknowledged that a cross was "certainly a [religious] symbol," but concluded that it "was not emplaced on Sunrise Rock . . . to set the *imprimatur* of the state on a particular creed." *Id.* at 715; *see also id.* at 725 (Alito, J., concurring).

The overwhelming authority affirming that religious symbols have a place in the public sphere should have made this case an easy one. Yet the court of appeals gave dispositive weight to the cross's "inherent religious meaning." Pet. App. 17a–18a. Permitting the religious meaning of the cross to overwhelm the Bladensburg Memorial's roots in our

Country's history and longstanding traditions cannot be squared with this Court's Establishment Clause jurisprudence. Even the endorsement test—which this Court has found to be unhelpful in dealing with public acknowledgements of religion like the Bladensburg Memorial, *Town of Greece*, 572 U.S. at 579–80; *Van Orden*, 545 U.S. at 686 (plurality); *id.* at 699–700 (Breyer, J.)—does not contemplate an absolute prohibition on the use of inherently religious symbols on government property. *See Allegheny Cty. v. ACLU Greater Pittsburgh Chapter*, 492 U.S. at 595 (the endorsement inquiry "turns upon the context," which, "though not neutralizing the religious content" of religious imagery, may "negat[e] any message of endorsement of that content"), *abrogated by Town of Greece*, 572 U.S. 565.

What is more, the court of appeals' approach evinces a hostility to religion that the Constitution forbids. The Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673. "Anything less would require the callous indifference [the Court has] said was never intended by the Establishment Clause." *Id.* (quotation marks omitted). The Court has warned that "such hostility would bring [it] into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *Id.* (quotation marks omitted).

Requiring the destruction, disfigurement, or removal of the Bladensburg Memorial would serve as "an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent

on eliminating from all public places and symbols any trace of our country's religious heritage." *Buono*, 559 U.S. at 726 (Alito, J.). Moreover, the rule the court of appeals implicitly adopted would require the destruction of so many monuments, the erasure of so many symbols, the abandonment of so many traditions, solely because of their religious derivation, that it would unavoidably ignite the very "kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J.).

At least in the context of memorials, civic ceremonies, or similar practices that acknowledge or reflect the religious traditions of our people, this Court should look to this country's history and traditions, rather than mechanically applying the *Lemon* factors or the endorsement test (whether considered separately or as part of the *Lemon* test). *See Van Orden*, 545 U.S. at 686 (plurality); *id.* at 703–04 (Breyer, J.). If a challenged practice reflects our history and traditions, then the Court should conclude that it is constitutional.[7] Indeed, "[i]f there is any inconsistency between any of" the myriad tests adopted for Establishment Clause challenges and a historic practice with deep roots in this country's traditions, "the inconsistency calls into question the validity of the test, not the historic practice." *Town of Greece*, 572 U.S. at 603 (Alito, J., concurring); *see also Lee*, 505 U.S. at 631 (Scalia, J., dissenting). The use of a cross as a symbol of courage, sacrifice, and remembrance is both widespread and deeply rooted in

[7] By contrast, it does not follow that a practice not clearly rooted in our history and traditions is unconstitutional. Rather, such a practice should be evaluated under other tests, such as the test advanced by Petitioner the American Legion.

our Country's history and tradition. If the *Lemon* factors or the endorsement test are thought to cast any doubt on that practice, then that is simply one more reason to doubt those tests' usefulness, at least in this context.

CONCLUSION

For the above reasons, this Court should reverse the judgment of the court of appeals.

December 26, 2018

Respectfully submitted,

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APPENDIX A – COMPLETE LIST OF *AMICI CURIAE*

I. United States Senators (20)

Ted Cruz, lead Senate *amicus curiae*
Lamar Alexander
Roy Blunt
Shelley Moore Capito
Bill Cassidy
John Cornyn
Tom Cotton
Mike Crapo
Steve Daines
Michael B. Enzi
Joni K. Ernst
Orin G. Hatch
James Inhofe
John Kennedy
James Lankford
James E. Risch
M. Michael Rounds
Marco Rubio
Thom Tillis
Roger Wicker

II. Members of the United States House of Representatives (64)

Steve Scalise, lead House *amicus curiae*
Ralph Abraham, M.D.
Robert B. Aderholt
Jodey C. Arrington
Jim Banks
Lou Barletta
Marsha Blackburn
Dave Brat
Michael C. Burgess, M.D.
Steve Chabot
Michael Cloud
Doug Collins
K. Michael Conaway
Jeff Duncan
John J. Duncan, Jr.
Neal P. Dunn, M.D.
Tom Emmer
Ron Estes
Chuck Fleischmann
Bill Flores
Matt Gaetz
Greg Gianforte
Louie Gohmert
Bob Goodlatte
Paul A. Gosar, D.D.S.
Garret Graves
Tom Graves

H. Morgan Griffith
Glenn Grothman
Brett Guthrie
Andy Harris, M.D.
Vicky Hartzler
Jody Hice
Clay Higgins
Richard Hudson
Bill Huizenga
Mike Johnson
Sam Johnson
Walter B. Jones
Jim Jordan
Trent Kelly
Steve King
Doug Lamborn
Robert E. Latta
Debbie Lesko
Billy Long
Tom Marino
Thomas Massie
Tom McClintock
Mark Meadows
Paul Mitchell
Ralph Norman
Pete Olson
David P. Roe, M.D.
Keith Rothfus
David Rouzer
Christopher H. Smith
Jason Smith
Lamar Smith
Tim Walberg
Mark Walker
Randy K. Weber
Daniel Webster
Brad Wenstrup

APPENDIX B—MONUMENTS

Argonne Cross

Canadian Cross of Sacrifice

Meuse-Argonne American Cemetery

Mt. Soledad Memorial Cross

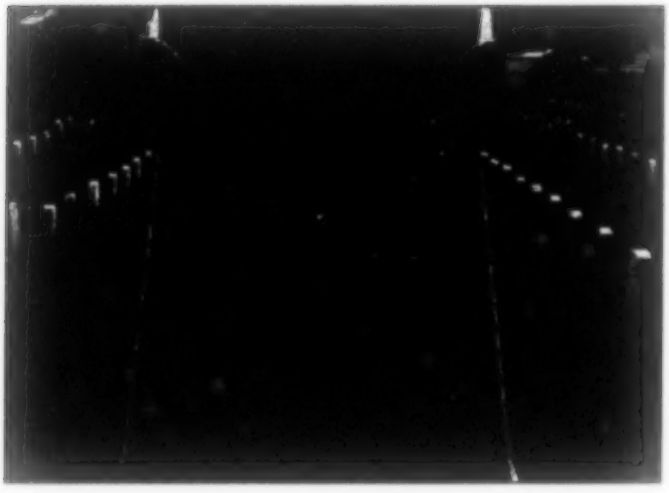
Irish Brigade Monument

NEW YORK MONUMENTS COMMISSION FOR THE BATTLEFIELDS OF GETTYSBURG AND CHATTANOOGA, FINAL REPORT ON THE BATTLEFIELD OF GETTYSBURG (NEW YORK AT GETTYSBURG) (1902)

49th New York Infantry Monument

NEW YORK MONUMENTS COMMISSION FOR THE BATTLEFIELDS OF GETTYSBURG AND CHATTANOOGA, FINAL REPORT ON THE BATTLEFIELD OF GETTYSBURG (NEW YORK AT GETTYSBURG) (1902)

140th New York Volunteer Infantry Regiment Monument

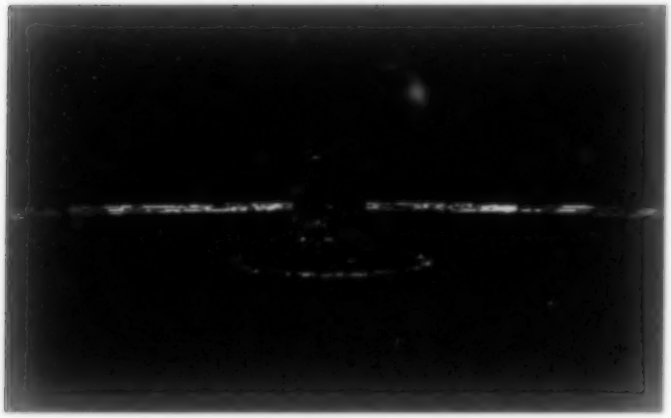


Army of the James Monument

Chaplains Hill Monuments

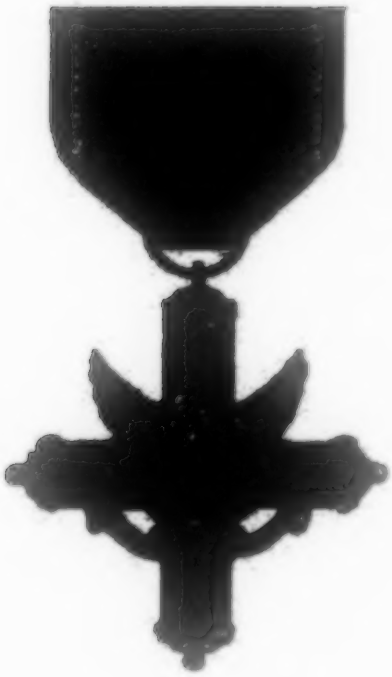
Spanish-American War Nurses Memorial

Cross at Ground Zero

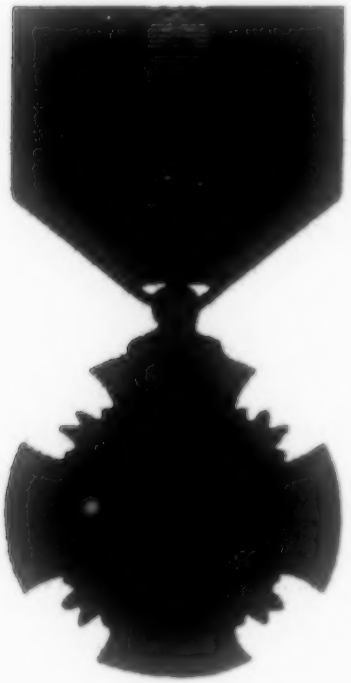


Federal Fallen Firefighters Memorial

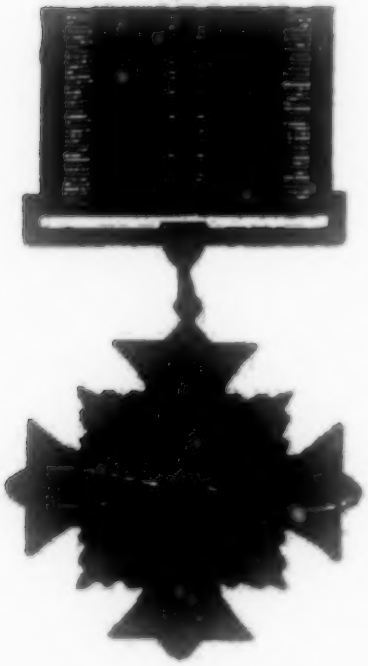
Cape Henry Memorial Cross



Distinguished Service Cross



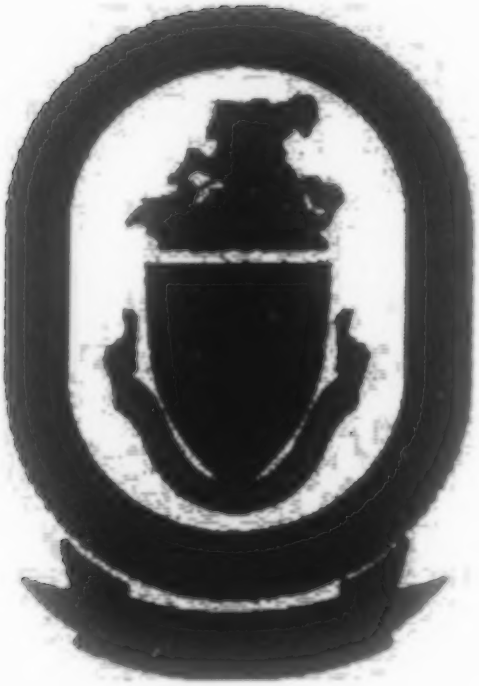
Navy Cross



Distinguished Flying Cross

Air Force Cross

Coast Guard Cross

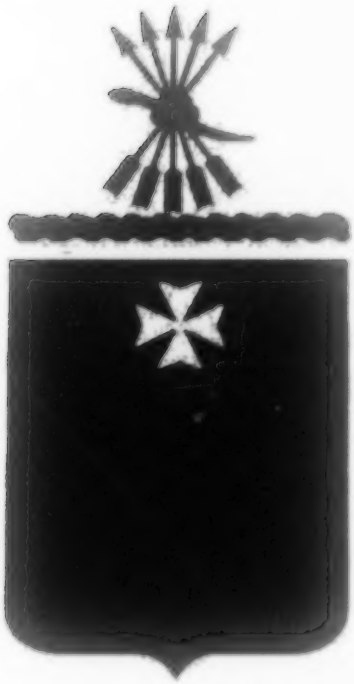


USS Arleigh Burke Crest

USS Mason Crest

USS Pearl Harbor Crest

Third Cavalry Regiment Coat of Arms



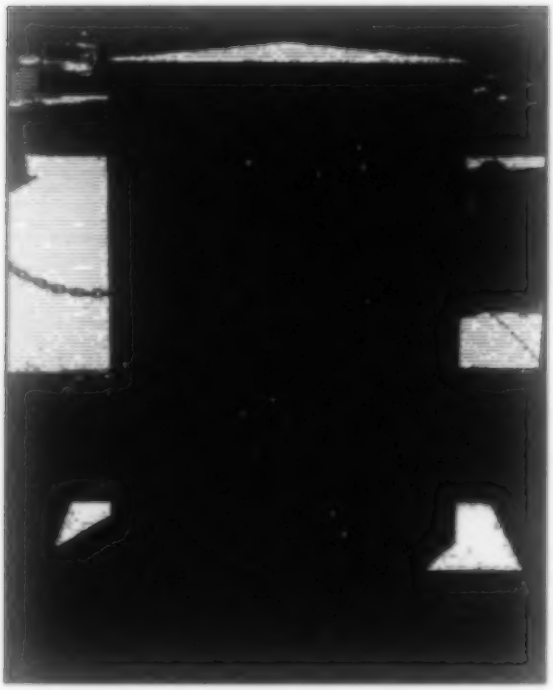
Fifth Cavalry Regiment Coat of Arms

USS Cape St. George Crest

USS Rentz Crest

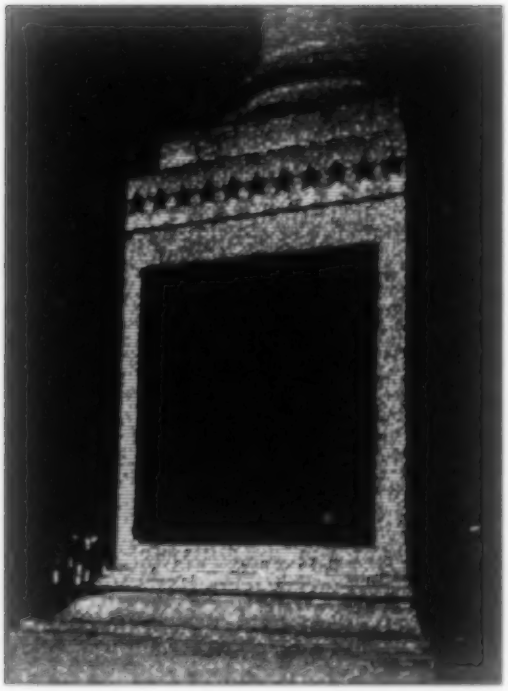
Tim Evanson, *Tomb of the Unknown Solider – NW view detail*, https://tinyurl.com/y7ayp7ho
(CC BY-SA 2.0)

Tomb of the Unknown Soldier



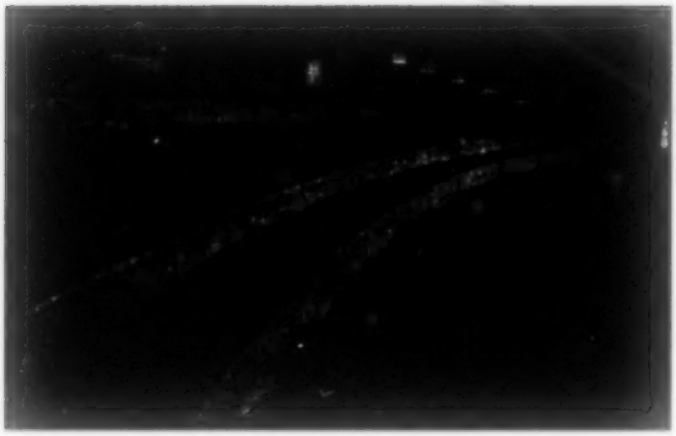
Anonymous, ***Shuttle Challenger – rear – Arlington National Cemetery – 2011***, https://tinyurl.com/y8bnbz2z (CC BY-SA 3.0)

Space Shuttle Challenger Memorial



Tim Evanson, *plaque at base – Spanish-American War Memorial*, https://tinyurl.com/ycckjlmh (CC-BY SA 2.0)

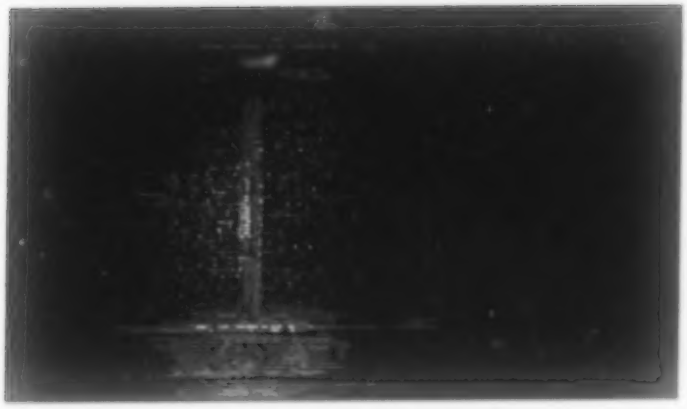
Spanish-American War Monument



United States Navy Memorial

Million Moments, ***National Law Enforcement Officers Memorial Lion***, https://tinyurl.com/yafdlqx6 (CC BY-SA 3.0)

National Law Enforcement Officers Memorial



Lincoln Memorial

Eternal Light Peace Memorial

Anonymous, *Father-Corby*,
https://tinyurl.com/ycfhhxxu
(CC BY-SA 4.0)

Monument to Father William Corby

Monument to the First Massachusetts Sharp Shooters

Palmer Chapel

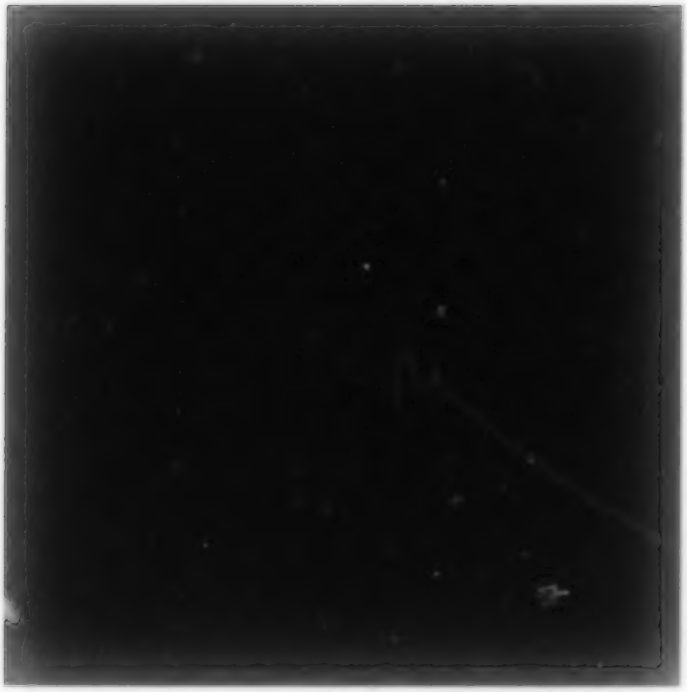
United States Capitol Prayer Room

Old Headquarters Building of the Central Intelligence Agency

Chambers of the United States
House of Representatives

Library of Congress, Main Reading Room

Library of Congress, West Corridor



Jesus, Robert F. Kennedy Building of the United States Department of Justice